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Supreme Court, U.S.
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No. 95-1388

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

ST. PAUL MERCURY INSURANCE COMPANY
and NORTH AMERICAN CONSTRUCTION
CORPORATION
Petitioners,

v.

B & D MECHANICAL CONTRACTORS, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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B & D Mechanical Contractors, Inc. ("B & D") has filed a Brief in Opposition to St. Paul Mercury Insurance Company's and North American Construction Corporation's (collectively "North American") Petition for a Writ of Certiorari arguing in four propositions why the Writ should be denied. In light of Rule 15 of the Rules of the Supreme Court of the United States, what is most significant about B & D's Objection is the arguments which are not raised.

First, B & D does not challenge North American's explanation of the legislative history of the Miller Act. (See Petition 14-18). Nor does B & D argue that from that legislative history it should be concluded that federal courts have exclusive jurisdiction of Miller Act claims.

Second, B & D does not challenge North American's analysis and application of this Court's concurrent jurisdiction cases. (See Petition 18-22). Nor does B & D argue that these cases do not support the conclusion that state and federal courts have concurrent jurisdiction over Miller Act claims.

Third, B & D does not contend that a venue provision can simultaneously be jurisdictional. B & D cites no case holding that language from a venue statute such as 40 U.S.C. §270b(b) also creates jurisdictional requirements.

I.

B & D, nonetheless, argues that this Writ should be denied. Because B & D does not, and cannot, make any of the preceding arguments, B & D is left to argue that the

Writ should be denied because the issue has been resolved by "30 years of precedent consistently holding that federal courts have exclusive jurisdiction over Miller Act claims." (Brief 3).

There are two primary defects in this approach. The first deals with the 30 years of precedent relied on by B & D. The most prominent of those cases is this Court's decision in F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974) which "is admittedly a Miller Act case." (Brief 4). B & D must argue, however, that Rich does not decide the jurisdictional issue raised in this Petition because if Rich did decide that issue, B & D loses.

However, none of the other decisions relied on by B & D were decided by this Court. Rule 10(c) of this Court's Rules provides that one of the reasons this Court will exercise its discretion and grant certiorari is when an important federal question has not but should be decided by this Court. Consequently, if Rich has not decided the jurisdictional issue, no Supreme Court decision has, and this is a case of first impression. B & D's attempts to distinguish Rich, however unsuccessful, only support the granting of the Writ in this case.

The second defect in B & D's approach stems from its conclusion that because the Miller Act creates a federal right, as this Court observed at page 127 of the Rich decision, federal courts necessarily have exclusive jurisdiction over claims arising under that statute. (Brief 6). B & D's conclusion does not conform to existing precedent.

For example, in Tafflin v. Levitt, 493 U.S. 455 (1990), this Court concluded that Congress created a new federal right under the civil RICO statutes over which state and federal courts have concurrent jurisdiction. Likewise, in Main v. Thiboutot, 448 U.S. 1 (1980), this Court held that state and federal courts have concurrent jurisdiction over the federal right of action created by 42 U.S.C. §1983.

When deciding federal claims controlled by federal law, state courts are required to follow and apply federal law. Stone v. Powell, 428 U.S. 465, at 493-495, n. 35 (1976); see also, Allen v. McCurry, 449 U.S. 90, at 105 (1980). Consequently, there is nothing inconsistent in the concept of concurrent state court jurisdiction over federally created rights such as the Miller Act.

However, even if B & D's conclusion was legally sound, "there is no 'universal right to litigate a federal claim in a federal district court.'" Matsushita Electrical Industrial Co., Ltd. v. Epstein, ____ U.S. ____, 116 S. Ct. 873, 883 (1996). Epstein involved a claim arising under the 1934 Securities and Exchange Act over which federal courts indisputably have exclusive jurisdiction. 15 U.S.C. §78aa. In a prior state securities class action, the Epstein Respondents, as class members, had entered into a settlement which included the agreement to waive all claims, rights and causes of action, state or federal, including but not limited to claims arising under the federal securities law. This Court held that the Full Faith and Credit Act, (28 U.S.C. §1738), applied to the State Court judgment approving the settlement, and that the release precluded litigation of the class members' 1934 Act claims, even though the State

Court did not have jurisdiction to decide the merits of those claims. "[A] statute conferring exclusive federal jurisdiction for a certain class of claims does not necessarily require resolution of those claims in a federal court." Id.

The arbitration cases confirm this principle even where the exclusive jurisdiction of the federal courts over the federal claim is not in dispute. See, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985), holding that parties can agree to resolve federal antitrust claims before an arbitrator in Japan; and Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), holding that parties can agree to resolve 1934 Securities Act claims before an arbitrator in France. Most notably, this principal is confirmed in a non-arbitration case. See Bremen v. Zapata Off-Shore Company, 407 U.S. 1 (1972) holding that parties can agree to resolve federal admiralty claims in the courts of England.

Even if this forum selection clause resulted in the waiver of B & D's Miller Act claim neither B & D nor the Court of Appeals point to any case or legal principle which would preclude B & D from suing "on the subcontract under state law without the Miller Act claim." United States ex rel. Pittsburgh Tank & Tower v. G & C Enterprises, Inc., 62 F.3d 35 (1st Cir. 1995). However, this result should not obtain in this case because St. Paul, the bonding company, has consented to be sued on its bond in State Court in Texas.

Nonetheless, even if B & D's argument that federal courts have exclusive jurisdiction of Miller Act claims is accepted as correct, the decision of the Court of Appeals is

in conflict with Epstein and Bremen, among others, and there is reason to grant this Writ. Supreme Court Rule 10(c).

II.

Next, B & D argues that this Court has previously cited Koppers Co. v. Continental Casualty Co., 337 F.2d 499 (8th Cir. 1964), unanimously and with approval, as "an example of a case addressing a situation in which a federal statute (the Miller Act) grants exclusive jurisdiction to the federal courts." (Brief 8). The supporting reference is to footnote 27 of this Court's Opinion in Franchise Tax Board v. Construction Laborers' Vacation Trust, 463 U.S. 1 (1983). The reference, however, does not justify B & D's claim.

Koppers held that removal to federal district court of a Capehart Act bond case was improper under the principle of derivative jurisdiction. The Koppers court found that because federal courts had exclusive jurisdiction of Capehart Act claims, the state court lacked jurisdiction of the original case. Consequently, there was no properly filed case over which the federal court could acquire derivative jurisdiction on removal and the federal action was dismissed. The discussion of the history of the case, the issue on appeal and the effect of the derivative jurisdiction principle in removal cases appears at pages 501-502 of the Koppers opinion, the

same pages cited by this Court in footnote 27 of the Franchise Tax case.[1]

The remainder of the Koppers Opinion is directed toward the holding, announced at page 506, that federal courts have exclusive jurisdiction of Capehart Act bond claims. This holding is premised on the conclusions that: (1) Section 2(b) of the Miller Act (40 U.S.C. §270b(b) applies to the Capehart Act; and, (2) Section 2(b) of the Miller Act is a grant of exclusive jurisdiction to federal courts. Therefore, if footnote 27 of the Franchise Tax Opinion has the significance attached by B & D, it is, at best, curious that pages 501-502 would have been singled out rather than page 506.

Koppers clearly interprets Section 270b(b) to be a grant of exclusive jurisdiction to federal courts. It reaches this conclusion after acknowledging, at page 505 of the Opinion, that there was a split in the existing federal authority on this issue. The Koppers court apparently found the cases holding Section 270b(b) was jurisdictional to be more persuasive and adopted that position. However, one of those cases, United States ex rel. Bryant Electric Co. v. Aetna Casualty & Surety Co., 297 F.2d 665 (2nd Cir. 1962), was apparently misread by Koppers. Cf. United States ex rel. Capolino Sons, Inc. v. Electronic & Missile

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[1]Further, at the point in the Franchise Tax Opinion where footnote 27 appears, the issue under discussion was whether ERISA preempted otherwise available state court claims based on the same subject matter. B & D has never claimed that the Miller Act preempts any similar state court breach of contract claim. In fact, B & D has included in its Complaint a pendent state law breach of contract claim. (App. 3).

Facilities, Inc., 364 F.2d 705, at 707 (2nd Cir. 1966), *cert. dismissed,* 385 U.S. 924.

If the question is the importance of this Court's reference to decisions from the Courts' of Appeals, North American maintains that the significant reference relevant to the issue raised by this Petition is in Rich. When holding, at page 125, that Section 270b(b) was "merely a venue requirement," this Court cited as support for that proposition the Missile Facilities decision (see n. 10), not Koppers and not Bryant Electric.

III.

The remaining arguments asserted by B & D raise no new issues or require no further comment except as follows. At page 17 of its Brief, B & D points out that the parties to this forum selection clause disagree as to its meaning. This merely confirms that the Court of Appeals improperly engaged in fact finding to reach its result. The intent of the parties with respect to the meaning of this provision was not an issue raised in the trial court nor was it one concerning which any evidence was introduced. The issue was first raised on appeal by B & D. This aspect of the Court of Appeals' decision is appropriate for review under Rule 10(a) and (c).

Further, B & D claims that North American first offered to litigate in the appropriate federal district court in Texas after it "became aware of the potential jurisdictional problems." (Brief 18). That is correct, however, North American first offered this alternative at oral argument when

B & D first raised its jurisdictional argument. Prior to that point, B & D had argued (1) that there were two contracts at issue, only one of which contained a forum selection clause; (2) North American's 12(b)(3) Motion to Dismiss should be treated as a Section 1404(a) motion to transfer; (3) the forum selection clause was superseded by the Miller Act's venue provision; and, (4) enforcement of the forum selection clause would be unreasonable. North American's "offer" was made to avoid a result by which B & D might lose its Miller Act claim because it filed its action in the wrong court.

Respectfully submitted,

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